United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-1078

To be argued by
MICHAEL YOUNG

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

Docket No. 75-1078

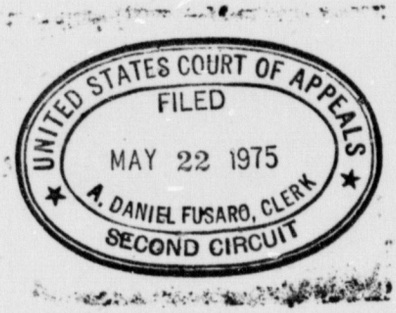
BRYAN CANNIFF and
JOHN BENIGNO,

Appellants.

FINAL DRAFT

BRIEF FOR APPELLANT
BRYAN CANNIFF

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



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QUESTIONS PRESENTED

1. Whether the consistently flagrant and inflammatory misconduct of the prosecutor in this case so prejudiced the jury's deliberations that it denied appellant Canniff his right to a fair trial.

2. Whether appellant Canniff's conviction should be reversed and the indictment dismissed because he was denied his sixth amendment right to a speedy trial.

3. Whether the district court erred in allowing the prosecutor to ask appellant Canniff's character witnesses whether they were aware that appellant Canniff had pleaded guilty to burglary in 1967.

4. Whether the district court erred in denying appellant Canniff's request that the Government be ordered to turn the presentence report on its principal witness, informant Miller, over to the district court for in camera inspection so that the court could release the relevant portions of that report to the defendants for use in impeaching Miller's testimony.

5. Appellant Canniff adopts any additional arguments raised by co-appellant Benigno in so far as those arguments are not inconsistent with the issues raised in this brief.

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STATEMENT PURSUANT TO RULE 28(3)

PRELIMINARY STATEMENT

This is an appeal from a judgment of the United States District Court for the Southern District of New York (The Honorable Lee P. Gagliardi), rendered March 14, 1975, after a jury trial, convicting appellant Canniff of conspiracy to possess and distribute cocaine in violation of 21 U.S.C. §§812, 841(a)(1) and 841(b)(1)(A) (count I); possession with intent to distribute and distribution of .34 grams of cocaine on October 17, 1973 (count II); and possession with intent to distribute 27.91 grams of cocaine on October 17, 1973, (count III). Appellant Canniff was sentenced to one year and one day incarceration on each count, sentences to run concurrently, and to a consecutive special parole term of three years.

The Federal Defender Services Unit of the Legal Aid Society was assigned as counsel on appeal, pursuant to the Criminal Justice Act.

STATEMENT OF FACTS

Pre-trial proceedings

Facts relevant to the speedy trial issue.

Appellant Canniff and his co-defendant Benigno were both arrested on October 17, 1973. They were not indicted

until almost one year later, on October 7, 1974. On December 26, 1974, appellant passed his 26th birthday (263). The trial commenced on January 9, 1975, and concluded January 14, 1975, when the jury found appellant Canniff guilty of the crimes charged.

During the trial, the district court stated:

> Mr. Canniff was just 26 three or four months ago. While I am not predicting what might happen here, nonetheless if that had been brought to my attention, I might have arranged to have this case expedited . . . he might have been subject to the youth corrections -- the young adult offender provisions. There is nothing that I can do, but it is very disturbing to me in the event that certain things occur . . .
>
> (339b-339c)

Severance

Prior to trial, the district court granted a severance of the two co-defendants on the basis of Bruton because the Government intended to introduce a post-arrest statement made by appellant Canniff. Thereafter, when appellant Canniff informed the Court that he would take the stand at trial in his own defense to claim entrapment, the Judge withdrew his previous order and directed that the defendants be tried jointly. (transcript of January 8, 1975 at 6).

Pre-trial suppression hearing

Prior to trial, a hearing was conducted on co-defendnat Benigno's motion to suppress marijuana found in the

apartment where he was arrested. At the conclusion of the hearing, the Judge ruled that the evidence was properly seized, but questioned its relevance to the issues in this case (transcript of January 9, 1975 at 42-46).

The trial.

Both in the pre-trial colloquy and in his opening statement, counsel for Mr. Canniff stated that Mr. Canniff would admit to the Government's evidence as to his participation in the October 17, 1973, transaction, but would testify that he was compelled and entrapped into doing so by Daniel Miller, a Government informant. (Transcript of January 8, 1975 at 2; trial transcript at 30-31).

Drug Enforcement Agency agent Hall testified that on October 12, 1973, informant Miller had called him stating that Mr. Canniff and "John" were in his apartment and had two ounces of cocaine to sell (170-1). Hall declined the transaction because Miller told him that they were expecting to have six ounces of cocaine for sale in the near future (171). "John" was then put on the phone, and urged Hall to purchase the two ounces of cocaine, but Hall again refused (172).

According to agent Sullivan, on October 17, 1973, he and agent Magnuson went to Friday's restaurant on 63rd Street to pose as potential buyers of cocaine (36). On that

afternoon, informant Miller and appellant Canniff entered Friday's and Miller introduced Mr. Canniff to the agents (36). According to Sullivan, Canniff told them that he had five ounces of cocaine which he would sell to them of $3500 (37). When questioned as to the quality of the cocaine, Mr. Canniff allegedly said that it was high quality and that he always sold decent cocaine (37). According to Sullivan, at Canniff's request, they went into the men's room where Sullivan showed Canniff the $3600 (37). Canniff then gave Sullivan a sample of cocaine saying that he would go get John and they would return with the rest of the drugs (39).

Canniff then left the restaurant. According to agent Hall, who followed him, Canniff drove to 525 East 81st Street, entered that building for a few minutes and then returned alone to Friday's restaurant (162). When Canniff re-entered Friday's, he told the agents waiting there that John didn't want to meet anybody, but wanted the agents to "front" the money with Canniff, after which Canniff would return with the drugs (40). When the agents refused, Canniff called John who still insisted that the money be fronted (40). When the agents again refused, Canniff called John a second time, and then told the agents that John had agreed to sell the drugs to the agents through Canniff one ounce at a time (41). When the agents agreed to this, Canniff told them to meet him in fifteen minutes on 81st

Street between York and First Avenues (41).

The agents then drove to the designated spot (43). Meanwhile, Miller and Canniff drove to 525 East 81st Street, and entered that building (162). When Miller exited the building shortly thereafter, agent Hall had a brief conversation with him, during which Miller told Sullivan that Canniff had proceeded alone to apartment 4E (163). Miller then entered agent Sullivan's car. Shortly thereafter, Canniff walked over to Sullivan's car and entered it (45). According to Sullivan, Canniff then handed him a clear plastic bag containing white powder, stating that this was the first ounce of cocaine and that it would cost $750 (45-6). Sullivan, according to a pre-arranged plan, stated that he didn't think the cocaine was that good (46). After Canniff stated that it was good, and worth the money, Sullivan ordered him out of the car (46). As Canniff exited the vehicle, Sullivan gave a pre-arranged signal, and agent Hall arrested Canniff (47, 165). Upon searching Canniff, Hall found the ounce of cocaine which Sullivan had just refused to purchase (165-6).

After his arrest, Canniff, in response to questioning by agent Hall, stated that he had gotten the cocaine from John in apartment 4E of 525 East 81st Street, and that

John was waiting for Canniff to return with the money (167). Canniff described John as being 5'8" tall, very thin, with long brown hair and a mustache and wearing a flowered shirt (167).

Hall and five or six other agents then entered that building and, together with the superintendent, knocked on the door to apartment 4E (167-8). When appellant Benigno opened the door and the agents identified themselves, Benigno, according to Hall, attempted to slam the door (168). The agents forced their way into the apartment and arrested Benigno and Diane Kane, a woman present in the apartment (170). Hall testified that Benigno was about 5'9" tall, thin, with long hair and a mustache, and was wearing a flowered shirt (169). The agents observed three tinfoil containers, one of which was open and seen to contain white powder, lying on a table in the apartment near where Miss Kane was sitting (170). Chemical analysis determined the white powder to be cocaine (229).

The Government's only direct evidence to counter appellant Canniff's entrapment defense was the testimony of Daniel Miller, an admitted drug dealer who had become a Goverrment informant upon his own arrest and agreed to "make" cases against other persons (95-7, 105, 108, 112-3). Miller testified that he had sold narcotic drugs to Canniff on between 50 and 100 different occasions, and had on several

occasions observed Canniff sell these drugs to other persons (87-88). Concerning the transaction charged in the indictment, Miller claimed that in October, 1973, after he had become a Government informant, Canniff and Benigno came to his apartment for the purpose of arranging a cocaine transaction (89-90). According to Miller, at a subsequant meeting in his apartment on October 12, 1973, Canniff and Benigno told him that they had two ounces of cocaine to sell (90). Miller stated that he told Canniff and Benigno that his buyers wanted at least four to six ounces of cocaine (91-92). Miller thereupon called agent Hall, pretending that Hall was the potential buyer (90). According to Miller, he put Benigno on the phone with Hall, and then overheard Benigno express his annoyance with Hall over his refusal to buy the two ounces (93).

Miller claimed that Canniff subsequently called to inform him that they had five ounces to sell (94). Miller then called agent Hall and set up the October 17 transaction (94). On that day, Canniff, on Miller's instruction, picked Miller up at his apartment and drove to Friday's restaurant, where Miller introduced Canniff to the agents (94-5).

Bryan Canniff testified in his own defense. He stated that he had never previously transacted in drugs with

Miller, and that he was not aware that Miller had been transacting in drugs (267, 269). Canniff testified that he had known Miller since 1972, and that beginning in August, 1973, (after Miller had become an informant) Miller began giving him gifts such as furniture for his loft and concert tickets. Miller also frequently bought Canniff and his girl friend drinks and food. In September, 1973, Miller even assisted Canniff by purchasing a car which Canniff had previously agreed to buy but had been unable to raise the money for (268).

Beginning in September, 1973, Miller began asking Canniff if he knew anyone who would sell Miller some cocaine (27). When Canniff responded that he didn't know anyone who dealt in cocaine, Miller asked Canniff to contact him if Canniff heard of any such person (270). Thus, when John Case, Canniff's roommate, introduced him to John Benigno and Benigno told him that he had the telephone number of someone who had some cocaine to sell, Canniff turned that number over to Miller, telling him that if he wanted to buy some cocaine he should call that number (270). About two weeks later, on October 16, 1973, Miller again called Canniff, asking him if he would be willing to purchase the cocaine for Miller (271). Canniff refused, telling Miller that he

should be able to conduct whatever dealings he wanted to make himself (271). That evening, Miller found Canniff in a neighborhood bar and told him that he had had a "falling out" with the individual who had the drugs, and was not able to purchase the cocaine he needed (271). Miller then asked Canniff, if he would take Miller's money and purchase the cocaine for him (271). Canniff again refused (271).

The following morning, Miller again called Canniff, saying that he had to go the the West Coast to meet a mutual friend of theirs, Ed Lindell, and that he needed money for the plane ticket (271). He then again urged Canniff to help him to get that money by picking up the cocaine for him (272). Canniff finally agreed to talk to Miller further at his apartment (272). There, Miller eased Canniff's apprehensions with champagne, offered Canniff $1000 and asked him if he would do this "favor" for him because he was in a "rather desperate position" (272). Miller stated that he had to complete the transaction that afternoon, and that there was no way it could be done unless Canniff helped him out (272). Under this urging, Canniff agreed to help Miller (272).

Canniff testified that the agents were basically correct in their description of the transaction which followed (273), and that Miller had made all of the arrangements for the transaction (275). Before they left Miller's apart-

ment to go to Friday's restaurant, Miller gave Canniff a sample of cocaine, saying that he was going to present Canniff as the person selling the drugs to his clients so that they would believe that the cocaine was of good quality (273). While at Friday's, Canniff became apprehensive concerning his participation in the transaction and took Miller outside, telling him that he didn't want to go through with the deal (274-75). Miller urged Canniff to reconsider, reminding him of their friendship and stating that he (Miller) was really desperate and everything was all arranged (274). When Canniff resisted, Miller became angry and threatened to injure him, a threat which Canniff took seriously because he knew that Miller owned several weapons and had attacked people in the past (275). Canniff thereupon continued with the transaction. He proceeded to the 81st Street address Miller had given him. The apartment door was answered by appellant Benigno, was told Canniff that "John" the owner of the apartment who had the cocaine to sell was not at home at the moment but would be right back (275). (Canniff later learned that "John"s real name was Juan Aponte (296-7)). When Canniff told Benigno what he was involved in, Benigno suggested that Canniff go back to the bar and tell Miller and the prospective buyers that the deal could not take place because the seller wasn't home (276).

Canniff then returned to the bar and told the agents and Miller that the deal couldn't take place, and that he didn't want to be involved any more (276). Miller then bought him several drinks, and insisted that he try calling the seller again, to see if the transaction could still take place, one ounce at a time (276). Canniff then called the phone number Miller had given him and spoke to John Aponte, who agreed to do the transaction as Miller had suggested (277).

Miller and Canniff then proceeded to the building on 81st Street, when Canniff left Miller in the lobby and went to apartment 4E. When Canniff knocked on the door, a voice inside the apartment, which Canniff did not recognize, asked who was there (344). After Canniff identified himself, the door was opened a crack (277), and Canniff was able to observe a portion of the features of what he believed to be a Puerto Rican male, taller than appellant Benigno, but also having a mustache and wearing a floral designed shirt (345). Because the door was only opened a crack, Canniff could not see who else was in the apartment (277). The man who opened the door handed Canniff a package of white powder and closed the door (277).

Canniff then exited the building and walked to Sullivan's parked car. He entered the back seat, and handed the cocaine to Miller, who in turn handed it to one of the

agents. After the agents rejected the cocaine, Canniff got out of the car, whereupon he was arrested by agent Hall. Following his arrest, Canniff identified apartment 4E and described appellant Benigno, the only person whose features he could describe (296).

Ron Smerechniak testified in appellant Canniff's behalf. Mr. Smerechniak, the manager of the Broome Street Bar where both Miller and Canniff testified that they frequently encountered each other during the months prior to the October 17 transaction, corroborated Canniff's testimony that Miller had on many occasions paid for Canniff's drinks (339d). Smerechniak also testified that Miller had a reputation in the area as being "violent prone" (339f).

Albert Baragwanath, the Senior Curator of the Museuam of the City of New York and Arthur Sempliner, the director of a design, research and development studio, both testified that appellant Canniff had worked for them and that they had never heard anything bad about his reputation for truthfulness and honesty (216, 221). The prosecutor, on cross-examination of each of these witnesses, was permitted, over defense counsel's objection, to ask them whether they knew that Canniff had pleaded guilty in 1967 to burglary in the State of Minnesota (218, 223). Co-appellant Benigno also

testified in his own behalf. He stated that he had never transacted or attempted to transact in drugs with Miller, Canniff or anyone else (371-372). Moreover, he had not been at Miller's apartment on October 12, 1973, as Miller had claimed (371). Concerning the events of October 17, 1973, Benigno testified that on that date, he was in the apartment in question doing carpentry work for the apartment's owner, John Aponte (374-5). While Benigno was there, appellant Canniff came to the apartment, saying he wanted to see "John." When Benigno said John had stepped out for a little while but would be back, Canniff stayed and talked to Benigno for a short time and then left (381-4). Soon thereafter, Benigno left the apartment to get some hardware supplies (435). When he returned, he noticed the tinfoil packets on the table, suspected that they contained cocaine since he knew that Aponte dealt in drugs, and assumed that the packets had been left there by Aponte (449). Next, Diane Kane, a friend of Benigno's who knew he was working on Aponte's apartment, stopped by to see him (374).

Moments later, there was a knock on the door. When Benigno answered it, he was confronted by agents who forced their way into the apartment and arrested him (374). Benigno testified that one of the agents repeatedly hit Benigno's head

against the refrigerator door in an attempt to compel him to sign a paper stating that he consented to a search of the apartment (376).

The Government, in rebuttal, recalled agent Hall, who testified that in early October 1973, Miller had described "John" as Italian, in his 20's, thin and with long dark hair (456). He also testified that Canniff, following his arrest, had described only one individual as being in the apartment (458).

Agent Magnuson also testified that to his knowledge, Miller had not threatened Canniff outside Friday's (475).

Following counsel's summations, the Court's charge and deliberations, the jury returned a verdict of guilty on all counts for both defendants.

The facts relating to the prosecutorial misconduct issue.

The prosecutor, in his opening statement, referred to appellant Canniff as "a prudent dealer in cocaine" (21), who was "undaunted" by the agents' initial reluctance to purchase the cocaine (22). Throughout his opening, the prosecutor described the Government's evidence as conclusive of guilt, and informed the jury that when they had heard the

evidence, "we are confident that you will find guilt beyond a reasonable doubt of both defendants" (25). He also informed the jury that if Canniff raised an entrapment defense, "the Government is prepared to prove to your satisfaction, beyond a reasonable doubt, that Bryan Canniff was ready, willing, able, indeed eager to commit the offenses for which he is charged . . . (25). Following this statement, the district court found it necessary to instruct the prosecutor to limit himself to "just an opening statement" (25). Moreover, the prosecutor's opening statement was such that the district court, at its conclusion, found it necessary to advise the jury that "the opinion of counsel as to the merits of their case is not a consideration for the jury" (26).

During the presentation of evidence, the district court repeatedly found it necessary to warn the prosecutor not to argue with the Court (88, 154, 191, 193) or with opposing counsel (197) and not to interrupt defense counsel's examination of the witnesses (284). The district court, on several occasions, found it necessary to reprimand the prosecutor with warnings such as the following:

> THE COURT: Please, . . . I have been lenient and I think I have been lenient because of the fact that you are new hear. [sic] Maybe I shouldn't be that lenient with a new attorney. I try to be. I have given enough warning here. I have restrained myself where I wouldn't do it with a more experienced attorney. But it doesn't seem to do any good. I don't like to do this down in public. I intended to do it afterwards because I like to see attorneys progress in the way they should. But, I'm sorry, I think I have a long fuse. May be the only way to do it, then, is to properly admonish attorneys in front of a jury, which I don't like to do.
>
> (391)

On at least 83 occasions during the prosecutor's cross-examination of the defendants, the district court sustained objections to questions asked by the prosecutor which were improper, irrelevant, prejudicial or argumentative. Examples of questions to which objects were sustained included the following:

> Are you accustomed to associating yourself with people who threaten other people with violence?
>
> (293)

> You start pretty big, don't you?
>
> (305)

> Do you know what happens to people who welch on narcotics deals?
>
> (321)

> QUESTION: And it didn't bother you to stay overnight. . .
> In a cocaine dealer's house.
>
> (425)

QUESTION: Daniel Miller did all the talking? Do you think the agents were mistaken, Agent Sullivan was mistaken when he took to stand and said --

MR MITCHELL: Objection, your Honor.

MR. KRIEGER: Objection.

THE COURT: Yes.

QUESTION: Agent Sullivan was wrong when he testified that you had done all the talking?

MR. KRIEGER: Objection.

THE COURT: Sustained.

QUESTION: Was Agent Sullivan lying when he said --

MR. MITCHELL: Objection.

THE COURT: Sustained.

QUESTION:You heard Agent Sullivan say that you had done all the talking?

ANSWER: I believe -- I don't remember. I guess he did.

QUESTION: You guess he did. And he was wrong?

ANSWER: Yes --

MR. KRIEGER: Objection.

MR. MITCHELL: Objection.

THE COURT: Sustained.

QUESTION: Do you know any reason why Agent Sullivan would like about something like that?

MR. KRIEGER: Objection, your Honor.

THE COURT: Sustained.

(307-308)

* * *

QUESTION: So the check bounced and you were so grateful to Daniel Miller for all the assistance he gave to you, that you decided to do a narcotics deal?

MR. MITCHELL: Objection.

THE COURT: Sustained.

(360-361)

* * *

QUESTION: And you were so grateful for the receipt of the furniture, that you decided to do a narcotics deal, right?

MR. MITCHELL: Objection

THE COURT: Sustained.

QUESTION: Daniel Miller gave you some concert tickets?

ANSWER: That is correct.

QUESTION: And that led you to do a narcotics deal, correct?

MR. MITCHELL: Objection

THE COURT: Sustained.

MR. MITCHELL: Your Honor, at this time --

THE COURT: Yes, I will, I will admonish [the Assistant United States Attorney].

QUESTION: Daniel Miller gave you some concert tickets, is that your testimony?

ANSWER: Yes.

QUESTION: Is it also your testimony that that contributed to your doing this narcotics deal?

MR MITCHELL: Objection.

THE COURT: Sustained. It would be proper in the summation but not the questioning, and that's the reason for it.

(361-362)

QUESTION: "Went down"? What does "went down" mean?

ANSWER: Occurred; something occurred.

QUESTION: Occurred? Is that common narcotics terminology for a deal going down?

ANSWER: I wouldn't know.

THE COURT: Please remain at the lectern, please, Mr. [Assistant United States Attorney].

QUESTION: You wouldn't know? But you just used the term.

ANSWER: I don't know if it's a common term for a narcotics deal.

QUESTION: But "went down" is a common word that you use, or combination of words that you use in your vocabulary?

ANSWER: All right. I'd say I just used it.

QUESTION: But you have never sold narcotics?

ANSWER: No, I have not.

QUESTION: You have never dealt in narcotics?

ANSWER: Never

QUESTION: But you used the term "went down"?

MR. MITCHELL: Argumentative.

(287-288)

* * *

QUESTION: What does the term "trip" mean to you?

ANSWER: Well, it's a term that Miller used for the -- what happened.

(298)

* * *

QUESTION: Isn't the word "trip" a common word used by narcotics traffickers?

ANSWER: I wouldn't know.

MR. MITCHELL: Objection.

QUESTION: You wouldn't know?

ANSWER: No, I wouldn't.

QUESTION: What did you think Daniel Miller meant when he used the work "trip"?

ANSWER: I just assumed that -- I understand the common slang terms of American English, and "trip" is a very common work used by everybody, not just people involved in narcotcs.

QUESTION: For a narcotics deal, that isn't a common word, "trip"?

ANSWER: I wouldn't know.

QUESTION: You wouldn't know? I thought you said you just did know that it was a common word.

MR. MITCHELL: I object to the District Attorney arguing with him.

THE COURT: Yes, sustained.

(298-300)

QUESTION: You knew he [John Aponte] was a cocaine dealer?

ANSWER: I found that out later.

* * *

QUESTION: But that didn't prevent you from living with him, did it?

MR. KRIEGER: Objection.

THE COURT: Sustained.

(422-423)

* * *

Do you know what perjury is . . . ?

(434)

The prosecutor opened his summation by telling the jury that the defendants' testimony was a "preposterous" "story" which "insults your intelligence." (529)

> . . . the Government's case [is] only strengthened by the preposterous story you heard these two defendants give, this story aimed at protecting them, protecting each other.
>
> (543)

> If it [appellant Canniff's testimony] wasn't so sad, it could be funny.
>
> (556)

> He [appellant Canniff] can't keep his story straight, and you and I know why he can't keep his story straight. It is a complicated story, and it is fabricated, it is not the truth.
>
> (559)

> If this story [appellant Canniff's testimony] wasn't absurd already . . .
> (559)
>
> It [appellant Canniff's testimony] strains your credulity, doesn't it? Doesn't it bring you just about to the brink, to the limit?
> (560)
>
> They [the appellants] are preposterous. Nobody in his right mind would do that. That story is absolutely absurd. It insults your intelligence.
> (561)
>
> Preposterous.
> (562)
>
> Preposterous. It [co-appellant Beigno's testimony] insults your intelligence.
> (564)
>
> Unfortunately, the stories [the appellant's testimony] could not stay straight because they were not the truth. Don't be duped by the story you heard.
> (568)

The prosecutor's repeatedly labeled the defendants "the cherub" (546, 546, 546) and "this innocent" (535, 539).

Referring to the testimony of Canniff's character witnesses, the prosecutor said that even"the most venal person in the world" could find someone to say something good about him (543). The prosecutor then went on to say that:

> No, the character witnesses had never heard anything bad about Bryan Canniff. But then, they had never dealt with him in narcotics . . .

> The gentlemen from the museum [one of Canniff's character witnesses] didn't even know about Bryan Canniff's conviction for burglary in the State of Minnesota.
>
> (544)

Concerning the testimony of Government informant Daniel Miller, the prosecutor stated:

> If Miller got on the stand and perjured himself, that's the next time he would find himself in court.
>
> (540)
>
> He [Miller] was told to tell the truth and that's what he did. You heard the whole truth [from Miller] . . . you heard the truth.
>
> (540)
>
> He [Miller] has a lot to lose if he lies.
>
> (541)
>
> Miller wasn't here to bury Canniff. He was here to tell the truth.
>
> (541)

Concerning the testimony of other Government witnesses, the prosecutor stated:

> Magnuson wouldn't mistake something like that. He is an experienced law enforcement officer.
>
> (537)
>
> Nobody left that building on that day except when the agents say they did.
>
> (537)
>
> Mr. Barbato [the chemist] didn't try to pull the wool over your eyes.
>
> (539)
>
> The defense has tried to show you that some sort of sordid deal was put together between the Government and Daniel Miller.
>
> (530)

The prosector also told the jury that from the defendants' words and actions,

> . . . you can see as clearly as day that the defendants are guilty of what they are charged with doing.
> (530)

> When you look at the two defendants and you listen to their stories, you know they are guilty.
> (532)

> Why does the Government believe Benigno is guilty?
> (564)

The prosecutor informed the jury that the Government's case was "strong" (543), and stated:

> Don't convict John Benigno solely on the basis of the jam. Convict him on the basis of the phone calls, the prior identification of Miller, of John as being an Italian and not a Puerto Rican, the phone conversation in which John does not have a Perto Rican accent, the fact that Bryan Canniff says "My man John is upstairs" and describes him to a T. And John Aponte is not in the apartment, this supposed John Aponte.
> That's why you should convict John Benigno.
> (567)

Later, the prosecutor stated:

> The Government submits when you have asked those questions, there is only one conclusion that you can reach in this case.
> (568)

These two defendants, Bryan Canniff and John Benigno, are guilty, and they are guilty beyond a reasonable doubt, and you should find them so.
(568-9)

The prosecutor also stated:

Canniff is anxious to do this deal. He is in this for the money.
(537)

Canniff wants this deal to go down. He is ready willing and able to do this deal. He is eager.
(538)

He [appellant Canniff] appears to be eager and that's just what he was, he was eager to have this deal go through.
(551)
He [appellant Canniff] does not want to appear eager.
(551)
He [Canniff] was ready, willing and able to do this narcotics deal, and that's what everything he did indicates.
(562)
He [Canniff] was eager to do this thing.
(562)

The agent was not a witness to any threat. Why? Because there was no threat.
(552)

The prosecutor said concerning co-defendant Benigno:

Who was [Canniff's supplier]. Sitting right there, John Benigno.
(535)

. . . the source of the cocaine is sitting right there.
(538)

Who is that man [the supplier of the cocaine]? Can there be any question as to who that man is? John Benigno.
(565)

> John Benigno, this innocent man, this man who is here as a terrible injustice, slammed the door on the agents. He says he didn't slam the door on the agents. Of course, he slammed the door on the agents. There were drugs in the apartment, and he knew. He had just done a deal with Bryan Canniff.
>
> (565-66)

> You have a choice in this case. You can believe the agents or you can believe Bryan Canniff.
> He would like you to think you can disbelieve Daniel Miller and you can believe the agents and everything is okay.
> Well, you can't.
> To find this man innocent, you have got to disbelieve the agents, you have to believe they were lying on the stand.
>
> (554)

> If you have the slightest doubt, if you think those agents are lying to you, acquit the defendants. I beg you, acquit them.
> But I submit to you that those agents were telling you the truth . .
>
> (543)

The prosecutor also told the jury:

> I want to help you along. I want to help you make a decision about whether or not Bryan Canniff was telling the truth or the agents were telling you the truth.
>
> (554)

> He [Miller] did some terrible things with Canniff before he got arrested in August, 1973. But Miller, unlike Bryan Canniff, has paid a price for what he did.
>
> (530)

If you had some children, if you have children about the age of 20, 25, if your child was offered concert tickets, someone picked up a few drinks for him,lent him or gave him some furniture, would your child do a narcotics deal, five ounces for $3500.

(562)

ARGUMENT

POINT I

THE CONSISTENTLY FLAGRANT AND INFLAMMATORY MISCONDUCT OF THE PROSECUTOR IN THIS CASE SO PREJUDICED THE JURY'S DELIBERATIONS THAT IT DENIED APPELLANT CANNIFF HIS RIGHT TO A FAIR TRIAL.

The prosecutor in a federal trial is charged with the promotion of justice rather than the interests of any particular party to a controversy. As the Supreme Court stated in Berger v. United States, 295 U.S. 78, 88 (1935), the prosecutor is the representative of a sovereignty "whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done." The prosecutor representing the United States in the present proceedings did not even approach the standards set by the Supreme Court and this Circuit for proper prosecutorial conduct at trial. To the contrary, in both his opening and closing statements, this Assistant United States Attorney repeatedly expressed his personal belief in the guilt of the defendants; used the prestige of the Government he was supposed to be representing and his position as an Assistant United States Attorney to bolster the testimony of the Government witnesses and undermine the testimony of

the defense witnesses, to misstate testimony and to make himself an unsworn witness attesting to facts not presented by any of the witnesses at trial; and made arguments which had no conceivable purpose except to enflame the passions of the jury against the defendants. Similarly, virtually every page of the transcript of this prosecutor's cross-examination of the defendants contained improperly prejudicial, inflammatory and argumentative questions.

The district court also found it necessary repeatedly to warn this Assistant United States Attorney not to argue with the Court (88, 154, 193, 391) or with opposing counsel (197) and not to interrupt defense counsel's examination of the witnesses (284). The prosecutor's conduct was so consistently objectionable that the district court was repeatedly forced to reprimand him with statements such as the following:

> THE COURT: Please, . . . I have been lenient and I think I have been lenient because of the fact that you are new hear. [sic] Maybe I shouldn't be that lenient with a new attorney. I try to be. I have given enough warning here. I have restrained myself where I wouldn't do it with a more experienced attorney. But it doesn't seem to do any good. I don't like to do this down in public. I intended to do it afterwards because I like to see attorneys progress in the way they should. But, I'm sorry, I think I have a long fuse. May be the only way to do it, then, is to properly admonish attorneys in front of a jury, which I don't like to do.
>
> (391)

The prosecutor's misconduct becomes even more egregious by virtue of the fact that despite such warnings, he persisted in repeatedly engaging in tactics for which he had already been specifically criticized by the district court.

A. The prosecutor's improper comments on the witnesses and his own unsworn "testimony" as to certain facts.

The question of the credibility of the witnesses was the central issue in this case. Both defendants took the stand, Canniff admitting his participation in the transaction charged in the indictment, but testifying that he had been coerced into doing so by Government informant Daniel Miller. Benigno acknowledged that he had been present in the apartment where the drugs were found, but insisted that he had not participated in the transaction. To counter the appellants' defenses, the Government relied heavily on the testimony of Daniel Miller, whose testimony was subject to close crutiny by virtue of his status as an informant and admitted drug dealer. Consequently, for the jury, the question of whom to believe was the central focus of their deliberations.

The prosecutor, realizing this, repeatedly sought to interject his personal opinion as to the credibility of the witnesses, as well as his own credibility and the prestige of his office and the United States Government into the

jury's deliberative process. The use of such tactics to bolster the testimony of Government witnesses and undercut the testimony of defense witnesses is one of the most commonly criticized forms of prosecutorial misconduct. United States v. Drummond, 481 F.2d 62 (2d Cir. 1973); United States v. Puco, 436 F.2d 761 (2d Cir. 1971); United States v. Grunberger, supra; Hall v. United States, 419 F.2d 582 (5th Cir. 1969); Gradsky v. United States, 373 F.2d 706 (5th Cir. 1967); United States v. White, 324 F.2d 814 (2d Cir. 1963); Dunn v. United States, supra; Greenberg v. United States, supra, United States v. Spanglet, 258 F.2d 338 (2d Cir. 1958).

This Court, in reversing the conviction in United States v. Drummond, supra, 481 F.2d at 64-5, specifically condemned a prosecutor's characterization that the defendant's testimony is "preposterous" and "insults" the jury's "intelligence." Yet,in the present proceeding, the prosecutor opened his summation with those exact terms, telling the jury that the defendants' testimony was a "preposterous" "story" which "insults your intelligence." (529) These same words and other equally improper statements then became a recurring theme in the uninhibited and highly prejudicial assault by the prosecutor on the defendants' credibility which was to follow:

> . . . the Government's case [is] only strengthened by the preposterous story you heard these two defendants give, this story aimed at protecting them, protecting each other.
>
> (543)
>
> If it [appellant Canniff's testimony] wasn't so sad, it could be funny.
>
> (556)
>
> He [appellant Canniff] can't keep his story straight, and you and I know why he can't keep his story straight. It is a complicated story, and it is fabricated, it is not the truth.
>
> (559)
>
> If this story [appellant Canniff's testimony] wasn't absurd already . . .
>
> (559)
>
> It [appellant Canniff's testimony] strains your credulity, doesn't it? Doesn't it bring you just about to the brink, to the limit?
>
> (560)
>
> They [the appellants] are preposterous. Nobody in his right mind would do that. That story is absolutely absurd. It insults your intelligence.
>
> (561)
>
> Preposterous.
>
> (562)
>
> Preposterous. It [co-appellant Beigno's testimony] insults your intelligence.
>
> (564)
>
> Unfortunately, the stories [the appellant's testimony] could not stay straight because they were not the truth. Don't be duped by the story you heard.
>
> (568)

Such statement are clearly improper and prejudicial. The Words of the Court in reversing for prosecutorial misconduct

in Greenberg v. United States, supra, are particularly appropos:

> To permit counsel to express his personal belief in the testimony (even if not phrased so as to suggest knowledge of additional evidence not known to the jury) would afford him a privilege not even accorded to witnesses under oath and subject to cross-examination. Worse, it creates the false issue of the reliability and credibility of counsel. This is peculiarly unfortunate if one of [the counsel] has official backing.
>
> (280 F.2d at 475)

Equally improper was the prosecutor's repeated efforts to discredit the defendants by assigning them derogatory names and incriminating titles. Thus, he continually entitled appellant Canniff the "prudent drug dealer" or simply the "drug dealer", a way of referring to a defendant which was condemned by this Court in United States v. Drummond, supra, 481 F.2d at 64. At least equally prejudicial was the prosecutor's sarcastic and derogatory labeling of the defendants as "the cherub" (546, 546, 546) and "this innocent" (535, 539), in direct violation of this Court repeated warnings that the use of:

> . . . epithets at a defendant that might be common-place in a second-rate movie or television script" is "beneath the dignity of the United States Attorney's office and of the United States as a sovereign ."
>
> (United States v. Fernandez, 480 F.2d 726, 742 n. 23 (2d Cir.1973).

See also United States v. Benter, 457 F.2d 1174, 1177 (2d Cir. 1972). In addition to being beneath the dignity of the United States Attorney's office, such name-calling unmistakably conveys to the jury the prosecutor's contempt for the defendants, as well as his belief that they are guilty and that they have perjured themselves.

Not content to limit such an assault to the defendants, the prosecutor also attacked the testimony of Canniff's character witnesses by improper means saying that even "the most venal person in the world" could find someone to say something good about him (543), implying thereby that that's what appellant Canniff was, and what he had done. The prosecutor then went on to say that:

> No, the character witnesses had never heard anything bad about Bryan Canniff. But then,they had never dealt with him in narcotics . . .
>
> (544)

thereby again reinforcing for the jury the prosecutor's personal opeinion as to appellant Canniff's guilt.

The prosecutor's most improper attack on the character witnesses followed thereafter:

> The gentleman from the museum [one of Canniff's character witnesses] didn't even know about Bryan Canniff's conviction for burglary in the State of Minnesota.
>
> (544)

Neither the prosecution nor the defense had ever introduced any evidence that Canniff had been convicted of burglary in Minnesota. By this statement, the prosecutor was improperly making himself an unsworn witness, not subject to cross-examination, attesting to the jury as to a fact not substaniated in the record, and conveying to the jury the impression that the prosecutor had personal knowledge of other incriminating evidence. United States v. Grunberger, supra; Hall v. United States, supra; King v. United States, 372 F.2d 383 (D.C. Cir. 1960); Jones v. United States, 338 F. 2d 553 (D.C. Cir. 1964); Dunn v. United States, supra; Greenberg v. United States, supra; Reichert v. United States, 359 F.2d 278 (D.C. Cir. 1060); United States v. Spanglet, supra; Ginsberg v. United States, 257 F.2d 950 (5th Cir. 1958); Nalls v. United States, 240 F.2d 707 (5th Cir. 1957); Taliaferro v. United States, 47 F.2d 699 (9th Cir. 1931). This misconduct by the prosecutor was particularly egregious given the widely recognized prejudicial impact of a prior conviction on the jury's determination of a defendant's credibility and his guilt or innocence.

At the same time that the prosecutor was leveling this improper assault on the defendants and their witnesses, he was employing equally improper tactics to reinforce the testimony of the Government witnesses. This Court has repeatedly

condemned efforts by the prosecutor

> to bolster the testimony of Government witnesses by implying that the association of a witness with the Government was a guarantee of credibility, and by expressing his personal opinion that the testimony of the Government witnesses was to be believed.
>
> (United States v. Drummond, supra, 481 F.2d at 63).

See also Gradsky v. United States, supra, 373 F.2d at 710; Dunn v. United States, supra; United States v. Grunberger, supra. Yet, that is precisely the type of conduct in which this prosecutor repeatedly engaged.

Much of this particular form of misconduct focused on the testimony of informant Daniel Miller, upon whom the Government was relying to counter appellant Canniff's entrapment defense. Miller's testimony was particularly suspect because he was an admitted drug dealer, who it was conceded, expected to benefit from incriminating the defendants in this case. (96-7). Realizing this, the prosecutor sought to bolster Miller's testimony, first by arguing:

> If Miller got on the stand and perjured himself, that's the next time he would find himself in court.
>
> (540).

Since the authority to bring such a prosecution for perjury was uniquely a power of the prosecutor who was making this statement, it constituted in effect a thinly veiled assurance

by the prosecutor that this witness had not committed perjury but rather had told the truth in incriminating the defendants.* Apparently afraid that this assurance by the prosecutor as to Miller's credibility was too oblique, the prosecutor then became more explicit:

> He [Miller] was told to tell the truth and that's what he did. You heard the whole truth [from Miller] . . . you heard the truth.
>
> (540)

Returning to the theme of perjury prosecution, the prosecutor then stated:

> He [Miller] has a lot to lose if he lies.
>
> (541)

and then added his personal assurance that:

> Miller wasn't here to bury Canniff. He was here to tell the truth.
>
> (541)

The prosecutor, in addition to giving these personal verifications of informant Miller's testimony, also gave his personal assurances to the jury as to the credibility of the other Government witnesses, and improperly sought to use their

---

* Moreover, the prosecutor's assurance that a Government witness who perjures himself will be prosecuted for that crime is a false assurance, as evidence by the fact that the Government has failed to prosecute its own witnesses in United States v. Sperling and United States v. Seijo, even though their perjury at trial resulted in the reversal of convictions in those cases by this Court.

identification with the Government to reinforce their testimony. (Compare United States v. Drummond, supra, 481 F.2d at 63-4).

Thus, the prosecutor gave the jury his personal assurance as to the accuracy of Agent Magnuson's testimony:

> Magnuson wouldn't mistake something like that. He is an experienced law enforcement officer.
> (537)

The fact of association with the Government was also used to bolster the testimony of Agent Hall (534). The prosecutor further gave the jury his personal assurance as to the credibility of the Government witnesses by declaring:

> Nobody left that building on that day execpt when the agents say they did.
> (537)

Even the Government's chemist received some assistance from this prosecutor:

> Mr. Barbato [the chemist] didn't try to pull the wool over your eyes.
> (539)

The prosecutor also improperly "interjected his beliefs and made an issue of his own credibility" (United States v. Drummond, supra, 481 F.2d at 64) by stating:

> The defense has tried to show you that some sort of sordid deal was put together between the Government and Daniel Miller.
> (530)

This statement was virtually identical to the statement which this Court condemned in United States v. Drummond, supra, 481 F.2d at 64, on the ground that such a statement suggests to the jury that they would have to find the prosecutor and the Government agents guilty of a criminal conspiracy to incriminate the defendants in order to credit the defense. Moreover, the prosecutor, in making this claim, misrepresented the defense. Neither defendant claimed that the Government had participated in a "sordid deal." Rather, they both argued only that informant Miller had entrapped and falsely incriminated the defendants in order to benefit himself.

These repeated efforts by the prosecutor to convey to the jury his personal opinion that the Government witnesses were credible whereas the defendants were "preposterous," and to interject his own prestige, credibility and unsworn "testimony" into the deliberative process were clearly violative not only of the standards of this Court (see e.g. United States v. Drummond, supra; United States v. Grunberger, supra; United States v. Puco, supra) but also the code of professional ethics (American Bar Association's Canon of Professional Ethics, Rules 15, 22; Drinker, Legal Ethics, 147).

B. The prosecutor's expressions of his personal belief that the appellants were guilty.

This Court and the Courts of other circuits have repeatedly held that prosecutors are not to express to the jury their opinion that the defendant is "guilty" or that the jury can only properly return a verdict of guilty. United States v. Grunberger, 431 F.2d 1062 (2d Cir. 1970); United States v. Schartner, 426 F.2d 470 (3d Cir. 1970); Dunn v. United States, 307 F.2d 885 (5th Cir. 1962); Greenberg v. United States, 280 F.2d 472 (1st Cir. 1970); Steele v. United States, 222 F.2d 628 (5th Cir. 1955). Despite this unequivocal proscription against such expressions, the prosecutor in this proceeding showed no hesitancy to express his personal opinion as to the guilty of the defendants, not once, but repeatedly during the proceedings. In the opening lines of his summation, the prosecutor told the jury that from the defendants' words and actions,

> . . . you can see as clearly as day that the defendants are guilty of what they are charged with doing.
> (530)

Even if the prosecutor did personally believe that the defendants' guilt was established as "clearly as day" it was improper for him to express that opinion to the jury.

The unavoidable danger is that the jury will accept the opinion of the prosecutor because of his expertise in criminal proceedings and his status as a representative of the United States Government, rather than making their own determination of the question of guilt or innocence.

Moments later, the prosecutor repeated almost verbatim this improper statement, telling the jury:

> When you look at the two defendants and you listen to their stories, you know they are guilty.
>
> (532)

Still later in his summation, the prosecutor asked the jury:

> Why does the Government believe Benigno is guilty?
>
> (564)

This rhetorical question again unmistakably and improperly conveyed to the jury that the prosecutor, as well as the United States Government, were of the opinion that the co-defendant was guilty of the crimes charged.

The prosecutor, apparently not content merely with these general expressions of his opinion that the defendants were guilty, went further, improperly telling the jury that he believed the Government's case was "strong" and that the Government had met its burden of proof beyond a reasonable doubt. Eventually he actually demanded that the jury return a verdict of guilty.

In his opening statement, the prosecutor, while subdued in comparison with his later statement, was still improper when he told the jury:

> We [the prosecutor and the Government] are confident that you will find guilt beyond a reasonable doubt of both defendants.
>
> (25)

On the issue of entrapment, the prosecutor was more emphatic, telling the jury how strong he believed the Government's case to be on that question:

> . . . the Government is prepared to prove to your satisfaction, beyond a reasonable doubt, that Canniff was ready, willing, able, indeed eager, to commit the offenses for which he is charged.
>
> (25)

In essence, the prosecutor, by these statements, was urging the jury to accept his expert opinion as to the sufficiency of the evidence rather than making this determination themselves, as was their duty. These opening statements prompted the district judge to warn the prosecutor to "limit [himself] to just an opening statement" (25) and then to caution the jury that:

> . . . the opinion of counsel as to the merits of their case is not a consideration for the jury.
>
> (26)

Undaunted by the judge's warning, the prosecutor, in summation, informed the jury that he believed the Government's case was "strong" (543), and actually directed the jury to convict

the appellants. Thus, at one point he stated:

> Don't convict John Benigno solely on the basis of the jam. Convict him on the basis of the phone calls, the prior identification of Miller, of John as being an Italian and not a Puerto Rican, the phone conversation in which John does not have a Perto Rican accent, the fact that Bryan Canniff says "My man John is upstairs" and describes him to a T. And John Aponte is not in the apartment, this supposed John Aponte.
>
> That's why you should convict John Benigno.
>
> (567)

Later, the prosecutor stated:

> The Government submits when you have asked those questions, there is only one conclusion that you can reach in this case.
>
> (568)

The prosecutor then concluded his summation by instructing the jury:

> These two defendants, Bryan Canniff and John Benigno, are guilty, and they are guilty beyond a reasonable doubt, and you should find them so.
>
> (568-9)

The prosecutor also took it upon himself to express his personal opinion as to appellant Canniff's predisposition to engage in the transaction, and the impossibility of entrapment:

> Canniff is anxious to do this deal. He is in this for the money.
>
> (537)
>
> Canniff wants this deal to go down. He is ready willing and able to do this deal. He is eager.
>
> (538)

> He [appellant Canniff] appears to be eager and that's just what he was, he was eager to have this deal go through.
> (551)
> He [appellant Canniff] does not want to appear eager.
> (551)
> He [Canniff] was ready, willing and able to do this narcotics deal, and that's what everything he did indicates.
> (562)
> He [Canniff] was eager to do this thing.
> (562)

Concerning Canniff's testimony that Miller had threatened him with physical harm if he failed to complete the deal, the prosecutor again urged his personal opinion on the jury:

> The agent was not a witness to any threat. Why? Because there was no threat.
> (552)

Similarly, the prosecutor showed no hesitancy to substitute his personal opinion for the jury's deliberative process on the question of whether co-defendant Benigno had been involved in the transaction. On repeated occasions, the prosecutor, employing melodrama inappropriate to a federal courtroom, would point an accusing finger at co-defendant Benigno and proclaim:

> Who was [Canniff's supplier]. Sitting right there, John Benigno.
> (535)

This same finger-pointing routine was repeated moments later as the prosecutor declared:

> . . . the source of the cocaine is sitting right there.
> (538)

Still later, the prosecutor again declared:

> Who is that man [the supplier of the cocaine]? Can there by any question as to who that man is? John Benigno.
> (565)

The prosecutor then went still further to cement in the jury's mind his personal opinion of the co-appellant's guilt, saying sarcastically:

> John Benigno, this innocent man, this man who is here as a terrible injustice, slammed the door on the agents. He says he didn't slam the door on the agents. Of course, he slammed the door on the agents. There were drugs in the apartment, and he knew. He had just done a deal with Bryan Canniff.
> (565-66)

Since appellant Canniff had testified that Benigno had not been involved in the transaction, the prosecutor's improper comments as to Benigno's guilt inevitably had a prejudicial impact on the jury's consideration of appellant Canniff's credibility and his guilt or innocence. It is not necessary for the prosecutor expressly to preface his remarks with the words "I believe" for those remarks to be improper where, as here, the statements unmistakably convey to the jury that the prosecutor believes the defendant is guilty. United States v. White, 324 F.2d 814 (2d Cir. 1963). By seeking to impose his finding of guilt upon the jury,

this prosecutor interfered with the principal jury function, depriving appellant Canniff of his constitutional right to have his innocence or guilt determined by a jury which is unaffected by the Assistant United States Attorney's personal opinion of his guilt.

C. The prosecutor's misrepresentation of the testimony of the witnesses at trial.

The prosecutor, while repeatedly declaring to the jury that the Government's case was "strong" and the defense "preposterous," was apparently still concerned enough about the possibility of acquittal, that he found it necessary repeatedly to distort the testimony which was given at trial, fashioning it into a version of the facts which was more beneficial to the prosecution and more conducive to conviction.

The most egregious example of this type of misconduct was the prosecutor's insistence that the jury would have to find that the federal agents had lied before they could acquit appellant Canniff. Although Canniff disagreed with various details of the agents' testimony, he admitted participating in the transaction which they had described. His defense of entrapment rested on the coersion which informant Miller had used to compel Canniff to act as the middleman in the transaction. These efforts by Miller, including gifts, drinks, appeals to friendship and pleas of desperation, pri-

marily took place prior to the commencement of the transaction on October 17, 1973, and were not witnessed by the agents. It was therefore entirely possible for the jury to credit the agents' testimony, even to the point of accepting the agents' rather then Canniff's version of the disputed details and still acquit Canniff upon a finding that Miller's coersive tactics constituted entrapment. The prosecutor, apparently fearful of such a verdict, bluntly misinformed the jury:

> You have a choice in this case. You can believe the agents or you can believe Bryan Canniff.
> He would like you to think you can disbelieve Daniel Miller and you can believe the agents and everything is okay.
> Well, you can't.
> To find this man innocent, you have got to disbelieve the agents, you have to believe they were lying on the stand.
> (554)

This misrepresentation of the testimony and the issues was made more prejudicial by the prosecutor's repeated personal assurances to the jury of the agents' credibility (See Point IA, supra) and by his previous statement:

> If you have the slightest doubt, if you think those agents are lying to you, acquit the defendants. I beg you, acquit them.
> But I submit to you that those agents were telling you the truth . . .
> (543)

This last comment reinforced the prosecutor's misrepresentation that the jury could not acquit appellant Canniff unless they first found that the agents had lied. It was then

followed by the prosecutor's personal assurance that the agents "were telling the truth."

The prosecutor in summation also misrepresented the testimony of witnesses in order to make Canniff appear more experienced in drug transactions and more eager to play an active role in the October 17 transaction. Thus, at one point, the prosecutor pretended to give the jury a direct quote attributed to Canniff, claiming that he had told the agents at the restaurant:

> I want the money fronted.
> (536)

In fact, the only testimony by the agents was that Canniff, upon returning from "John's" apartment, had said that "John" wanted the money fronted. (40). By misrepresenting this testimony in this fashion, the prosecutor made it appear that Canniff rather than John had insisted that the money be fronted, thereby making Canniff an active and willing participant, rather than someone who was coerced into acting as a middleman.

Moments later, the prosecutor again pretended to give the jury a direct quote, claiming that Canniff told agent Hall following his arrest that:

> My man John is upstairs.
> (538)

Agent Hall's testimony was that Canniff only said "a man named John" was waiting in the apartment. By replacing "a man"

with the colloquial drug expression for a supplier "my man", the prosecutor revised this particular testimony so as to support his theory that Canniff was an experienced drug dealer with an established source of drugs, again to counter the entrapment defense.

This repeated misrepresentation by the prosecution of the testimony actually given at trial cannot help but prejudice the defendant's case, and has repeatedly been condemned as error requiring reversal. United States v. Drummond, supra, 481 F.2d at 64; King v. United States, supra, 372 F.2d at 393, 396; Jones v. United States, supra.

D. This prosecutor distorted his relationship to the jury and sought to use their sense of self-respect and their emotions to prejudice them against the defendants.

Much of the prosecutor's misconduct at this trial, including many of the statements and actions previously described, were clearly designed to appeal to the jury on an emotional level and to prejudice them against the defendants. A few more examples will serve to demonstrate this universally condemned objective.

As previously described (Point IA, supra), the prosecutor repeatedly insisted that the defendants' testimony insulted the jury's intelligence. This type of argument clearly implied that the jury could not possibly believe the

defendant's testimony without conceding their own lack of intelligence and sophistication.*

Moreover, throughout the trial, the prosecutor sought to create the impression that he was really a thirteenth juror, and that both he and the jury were aligned against the defendants:

> I want to help you along. I want to help you make a decision about whether or not Bryan Canniff was telling the truth or the agents were telling you the truth. (554)

This same theme was repeated later:

> . . . you and I know why he [Canniff] can't keep his story straight. It is a complicated story, and it is fabricated, it is not the truth. (559)

Other of the prosecutor's comments were equally inflammatory and prejudicial:

> He [Miller] did some terrible things with Canniff before he got arrested in August, 1973. But Miller, unlike Bryan Canniff, has paid a price for what he did. (530)

> If you had some children, if you have children about the age of 20, 25, if your child was offered concert tickets, someone picked up a few drinks for him, lent him or gave him some furniture, would your child do a narcotics deal, five ounces for $3500. (562)

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* The prosecutor told the jury that the defendant's testimony was "preposterous . . . [it] insults your intelligence (529). . . you can see as clearly as day that the defendants are guilty of what they are charged with doing (530) . . . [the defendants' testimony] strains your credulity, doesn't it? Doesn't it bring you just about to the brink, to the limit? (560) . . . They [the defendants] are preposterous. Nobody in his right mind would do that. That story is absolutely absurd. It insults you intelligence (561) . . . Preposterous. It insults your intelligence (564) . . . Who is that man? Can there be any question as to who that man is? John Benigno (565) . . . Don't be duped by the story you heard (568).

In a case involving similar prejudicial prosecutorial statements, Judge Lumbard wrote for this Court:

> It is the prosecutor's obligation to avoid arguments on matters which are immaterial and which may serve only to prejudice the defendant. It is his duty above all else to be fair and objective and to keep his argument within the issues of the case.... We cannot condone the deliberate and unnecessary references to an immaterial detail. The nature of the prosecutor's references showed that his purpose could only have been to suggest that the defendant was a contemptible person.... The unfair, unwarranted and reprehensible summation deprived the defendant of the fair trial which is his right, regardless of how clear his guilt may seem or how strong the proof against him. Arguments such as those made in the prosecutor's summation should be beneath the dignity of a representative of the government of the United States as they are incompatible with the proper administration of criminal justice. Berger v. United States, 295 U.S. 78 ... (1935).
>
> United States v. Bugros, 304 F.2d 177, 179 (2d Cir. 1969).

See also Dunn V. United States, supra; Hall v. United States, supra; Richardson v. United States, 150 F.2d 58 (6th Cir. 1945). The prosecutor's summation in the present proceeding is equally, if not more, reprehensible.

E. The prosecutor's improper cross-examination of the defendants.

The prosecutor's cross-examination of the defendants in this case was equally as improper and prejudicial as his

summary arguments. In fact, the Court sustained objections to at least 83 improper, irrelevant and argumentive questions asked by this prosecutor during these two cross-examinations. In reading through these cross-examinations, it becomes apparent that the prosecutor was utilizing this opportunity to in effect make a preliminary closing argument, expressing his disbelief of the defendants' testimony, bolstering the prior testimony of the Government agents, expressing his own opinions as fact, urging conclusions on the witnesses and the jury, asking irrelevant but inflammatory questions, and arguing with the defendants on the stand. Even his general conduct was improper, requiring the Court repeatedly to warn him and/or advise the jury to disregard his yelling at the witnesses (330), his smirking at the jury while the defendant was answering a question (298), his cutting off the defendants' answers to questions (303, 313, 324, 437) and even his repeatedly blocking the jury's and the Court's view of the witnesses (287, 289, 296). Only a reading of the entire cross-examination of the defendants will fully establish the extent of the misconduct which occurred here. However, a few examples will serve to demonstrate the prejudice and impropriety of the prosecutor's questions.

Many of the prosecutor's questions were totally irrelevant, and clearly posed solely to prejudice the jury against the defendants:

> Are you accustomed to associating yourself with people who threaten other people with violence?
>
> (293)
> objection sustained

In referring to appellant Canniff's testimony that the October 17 transaction was the first transaction in which he had participated, the prosecutor asked:

> You start pretty big, don't you?
>
> (305)
> objection sustained

Other questions were equally irrelevant and prejudicial:

> Do you know what happens to people who welch on narcotics deals?
>
> (321)
> objection sustained

> And it didn't both you to stay overnight. . . In a cocaine dealer's house.
>
> (425)
> objection sustained

The prosecutor repeatedly attempted to force the defendants to acknowledge that the charges against them were "serious crimes." (306, 309, 433, objections sustained). In another form of misconduct, this prosecutor would ask a question as a vehicle for improperly making an argument to the jury, and then compound the impropriety by repeating the question, often several times, even after objection to the question had been sustained:

QUESTION: Daniel Miller did all the talking? Do you think the agents were mistaken, Agent Sullivan was mistaken when he took to stand and said --

MR MITCHELL: Objection, your Honor.

MR. KRIEGER: Objection.

THE COURT: Yes.

QUESTION: Agent Sullivan was wrong when he testified that you had done all the talking?

MR. KRIEGER: Objection.

THE COURT: Sustained.

QUESTION: Was Agent Sullivan lying when he said --

MR. MITCHELL: Objection.

THE COURT: Sustained.

QUESTION:You heard Agent Sullivan say that you had done all the talking?

ANSWER: I believe -- I don't remember. I guess he did.

QUESTION: You guess he did. And he was wrong?

ANSWER: Yes --

MR. KRIEGER: Objection.

MR. MITCHELL: Objection.

THE COURT: Sustained.

QUESTION: Do you know any reason why Agent Sullivan would lie about something like that?

MR. KRIEGER: Objection, your Honor.

THE COURT: Sustained.

(307-308)

* * *

QUESTION: So the check bounced and you were so grateful to Daniel Miller for all the assistance he gave to you, that you decided to do a narcotics deal?

MR. MITCHELL: Objection.

THE COURT: Sustained.

(360-361)

* * *

QUESTION: And you were so grateful for the receipt of the furniture, that you decided to do a narcotics deal, right?

MR. MITCHELL: Objection

THE COURT: Sustained.

QUESTION: Daniel Miller gave you some concert tickets?

ANSWER: That is correct.

QUESTION: And that led you to do a narcotics deal, correct?

MR. MITCHELL: Objection

THE COURT: Sustained.

MR. MITCHELL: Your Honor, at this time --

THE COURT: Yes, I will, I will admonish [the Assistant United States Attorney].

QUESTION: Daniel Miller gave you some concert tickets, is that your testimony?

ANSWER: Yes.

QUESTION: Is it also your testimony that that contributed to your doing this narcotics deal?

MR MITCHELL: Objection.

THE COURT: Sustained. It would be proper in the summation but not the questioning, and that's the reason for it.

(361-362)

The prosecutor also repeatedly sought to impose his own conclusions on the witness and jury, even when his question had already been answered to the contrary:

QUESTION: "Went down"? What does "went down" mean?

ANSWER: Occurred; something occurred.

QUESTION: Occurred? Is that common narcotics terminology for a deal going down?

ANSWER: I wouldn't know.

THE COURT: Please remain at the lectern, please, Mr. [Assistant United States Attorney].

QUESTION: You wouldn't know? But you just used the term.

ANSWER: I don't know if it's a common term for a narcotics deal.

QUESTION: But "went down" is a common word that you use, or combination of words that you use in your vocabulary?

ANSWER: All right. I'd say I just used it.

QUESTION: But you have never sold narcotics?

ANSWER: No, I have not.

QUESTION: You have never dealt in narcotics?

ANSWER: Never

QUESTION: But you used the term "went down"?

MR. MITCHELL: Argumentative.

(287-288)

* * *

QUESTION: What does the term "trip" mean to you?

ANSWER: Well, it's a term that Miller used for the -- what happened.

(298)

* * *

QUESTION: Isn't the word "trip" a common word used by narcotics traffickers?

ANSWER: I wouldn't know.

MR. MITCHELL: Objection.

QUESTION: You wouldn't know?

ANSWER: No, I wouldn't.

QUESTION: What did you think Daniel Miller meant when he used the work "trip"?

ANSWER: I just assumed that -- I understand the common slang terms of American English, and "trip" is a very common work used by everybody, not just people involved in narcotcs.

QUESTION: For a narcotics deal, that isn't a common word, "trip"?

ANSWER: I wouldn't know.

QUESTION: You wouldn't know? I thought you said you just did know that it was a common word.

MR. MITCHELL: I object to the District Attorney arguing with him.

THE COURT: Yes, sustained.

(298-300)

The prosecutor also persistently referred to John Aponte, the individual whom both Canniff and Benigno testified had supplied the cocaine, as "this supposed John Aponte" (326, 337, 338) in a clear effort to convey to the jury the prosecutor's own disbelief in the defendants' testimony.

He repeatedly attempted to force the defendants to claim that the agents were deliberately lying when the agents' recollection of the events differed from that of the defendants. (308,354). He also sought to imply the guilt of the appellants merely from their associations with others:

> QUESTION: You knew he [John Aponte] was a cocaine dealer?
>
> ANSWER: I found that out later.
>
> * * *
>
> QUESTION: But that didn't prevent you from living with him, did it?
>
> MR. KRIEGER: Objection.
>
> THE COURT: Sustained.
>
> (422-423)

This last question was also objectionable because it conveyed the prosecutor's disbelief of Benigno's prior testimony that he had not lived with Aponte, but rather had only done carpentry work for him.

The prosecutor also made clear his disbelief of the appellant's testimony through such questions as:

> Do you know what perjury is . . . ?
> (434)

It was clearly improper for the prosecutor in this case to use such cross-examination tactics to convey to the jury his personal "disbelief of the defendant's witnesses" (See e.g. United States v. Drummond, supra, 481 F.2d at 63) and as a vehicle to make closing arguments to the jury and to prejudice the jury against the defendants on the basis of irrelevant questions and facts.

F. Conclusion.

Most of the instances of prosecutorial misconduct cited here and many others were objected to at trial below. The few occasions on which counsel failed to object were in all probability the result of the overwhelming number of occasions on which such misconduct occurred or the exasperation caused by this prosecutor's apparent determination to continue along the course he had chosen despite the fact that objections were repeatedly sustained as to his misconduct. Moreover, as this Court has repeatedly realized, in some instances objections would have served only to emphasize the

improper statements to the jury, thus compounding the prejudice. As such, the few times defense counsel failed to object would clearly be noticeable as plain error. United States v. Semonsohn, 421 F.2d 1206 (2d Cir. 1970); King v. United States, supra; Ginsberg v. United States, supra; Nalls v. United States, supra.

Furthermore, although the trial court on occasion attempted to neutralize the prosecutor's misconduct through corrective instructions, as this Court held in United States v. Semonsohn, supra:

> A judge's corrective statement will rarely completely cure that prejudical damage created when improper information reached the ears of the jury. "Prejudices which are so easily aroused are not thus so readily expunged."
>
> (Id. at 1208).

See also Krulewitch v. United States, 336 U.S. 440, 453 (1949) (concurring opinion); United States v. Grunberger, supra, 431 F.2d at 1068; United States v. DeSisto, 289 F.2d 833, 835 (2d Cir. 1961). The ineffectiveness of such instructions should be especially clear in the present proceeding, given the gravity of the misconduct which occurred.

Repeatedly in the recent past this Court has cited instances of prosecutorial misconduct, and has warned the United States Attorney's office that if such conduct persisted, reversals would result. In United States v. Benter, 457 F.2d

1174 (2d Cir. 1972), this Court stated:

> We are reminded in summation cases that repeated rebukes of the prosecution by an appellate court without reversal may ultimately become "an attitude of helpless piety," and our "deprecatory words . . . purely ceremonial." Frank, J., dissenting in United States v. Antonelli Fireworks Co., 115 F.2d 631, 661 (2d Cir.), cert. denied, 329 U.S. 742, 67 S. Ct. 49, 91 L.Ed. 640 (1946). We trust that the rebukes in United States v. Isaza [452 F.2d 1259 (2d Cir. 1972)] and here, however, will not go unheeded by the prosecutorial staff . . .
>
> (Id. at 1178).

Despite such warnings, these same forms of prosecutorial misconduct have persisted, and in the present case were so flagrant as to seriously prejudice appellant's right to a fair trial.

The key issue as to appellant Canniff was whether the jury believed Canniff's testimony that he was entrapped by informant Miller, or Miller's denial of entrapment. In this context, the prosecutor's repeated effort to bolster Miller's testimony by personally vouching for its truthfulness was highly prejudicial. Equally detrimental to fair trial standards was the prosecutor's repeated insis-

tence to the jury that he felt Canniff's testimony was "preposterous" and "fabricated" and "insults your intelligence" as well as his insistence that the defendants were "guilty" and his demand that "you should find them so." These blatantly prejudicial statements, coupled with the prosecutor's repeatedly improper, irrelevant, argumentative cross-examination of the defendants, his distortions of the testimony, his reference to a prior conviction which he had not proven to exist, his efforts to emotionally bias the jury against the defendants, his frequent disregard of the judge's prior rulings, and his general behavior require reversal of this case. Appellant must be afforded his right to be tried in a proceeding which accords with the fair trial standards set by this Court, and to have his innocence or guilt determined by a jury whose deliberations are unclouded by the flagrant forms of prosecutorial misconduct practiced at the trial below.

POINT II

APPELLANT CANNIFF'S CONVICTION SHOULD BE REVERSED AND THE INDICTMENT DISMISSED BECAUSE HE WAS DENIED HIS SIXTH AMENDMENT RIGHT TO A SPEEDY TRIAL.

Both appellant Canniff and his co-defendant were arrested on October 17, 1973. They were not indicted, however, until one year later, on October 7, 1974, and their

trial did not commence until January 8, 1975, almost 15 months after their arrest. In the interim, on December 26, 1974, fourteen months after his arrest and only 13 days before his trial commenced, appellant Canniff's 26th birthday passed:

> and with it expired the defendant's eligibility for the advantages (primarily probation and the opportunity to have the conviction erased from his record) of a sentence imposed on him as a young adult offender under the Youth Corrections Act. 18 U.S.C. §§4209, 5010(a), 5021.
>
> (United States v. Roberts, slip op. 2795, 2797, Docket No. 75-1052 (2d Cir., April 9, 1975).

Although Canniff's trial counsel failed to move to dismiss the indictment on Sixth Amendment grounds, the district court took cognizance of the issue on its own during trial:

> THE COURT: Something is very much disturbing me here, there is nothing I can do about it because it was never brought to my attention until the moment that Mr. Canniff got on the stand . . . Mr. Canniff was just 26 three or four months ago [*]. While I am not predicting what might happen here, nonetheless if that had been brought to my attention I might have arranged to have this case expedited.
>
> MR. MITCHELL: We were not the ones that delayed it, your Honor.
>
> THE COURT: I know. There was about a year between the offense and the indictment, and it didn't come to me -- it was assigned to me on the end of October of this year.

---

* Actually only 13 days. (263).

MR. MITCHELL: We had a pre-trial conference on the 21st of October.

THE COURT: That is when it was assigned to me.

MR. MITCHELL: Rather the 1st of November.

THE COURT: I don't know that it was brought to my attention at that time that he might have been subject to the youth corrections -- the young adult offender provisions. There is nothing that I can do, but it is very disturbing to me in the event that certain things occur. But that's the way it is. This is the first time it's been brought to my attention, when he got on the stand and gave his date of birth. So be it. All right.
(339b-c)

The district court was correct in recognizing that appellant Canniff had been prejudiced by the delay in this trial. However, the Court was incorrect in concluding that there was nothing it could and should do when it discovered this prejudice during trial. The facts in this case - the 15 month delay between arrest and trial, the failure of the Government to indict until a year after the arrest, or to move the case to trial in a swifter fashion, and the consequent substantial prejudice of appellant Canniff's expired eligibility for treatment under the Youth Corrections Act - establish a Sixth Amendment violation which requires the dismissal of the indictment as to appellant Canniff under Barker v.

Wingo, 407 U.S. 514 (1972) and this Court's decision in United States v. Roberts, supra.

In Roberts, this Court applied the four factors of Barker - length of delay, reason for delay, the defendant's assertion of his right, and prejudice to the defendant - to sustain the dismissal of an indictment under circumstances which were not as conducive to a showing of speedy trial violation as the present proceeding. Thus, the first factor- the length of delay - was thirteen months in Roberts, as opposed to almost fifteen months in the present proceeding.

Similarly, the second factor- the cause of the delay - is more supportive of a speedy trial violation in the present proceeding than in Roberts. Roberts was a guilty plea case in which the Government caused the delay in the plea proceeding for the understandable, if not constitutionally permissible, reason that it wished to put off finalizing the plea bargain it had made with the defendant until after it decided whether to use the defendant as a Government witness in related cases (the defendant's part of the plea bargain). In the present proceeding, the Government simply failed to indict appellant Canniff for almost a year.*

* Going outside the record, I have been informed by trial counsel that the delay in indictment was the result of the Government's indecision as to whether also to indict co-defendant Benigno. As indicated in Roberts, the Government's concern over other defendants (or potential defendants) does not relieve it of its constitutional obligation to provide appellant Canniff with a speedy trial so as to avoid the substantial prejudice which he suffered as a result of the Government's delay.

As the district court acknowledged in the above-quoted colloquy, it was the Government's delay in indicting, rather than any action by defense counsel, which caused the substantial delay in trial (339b). Consequently, the reason for the delay is a Barker factor which must be counted heavily against the Government. United States v. Roberts, supra, slip op. at 2803.

The third factor- the prejudice resulting from the delay- is the same in this case as in Roberts. Because of the delay, appellant Canniff, like the defendant in Roberts passed his 26th birthday, thereby rendering him ineligible for treatment under the Youth Corrections Act. Moreover, the judge's statements in the above-quoted colloquy, as well as the year-and-a-day sentence which Canniff eventually received are evidence that the district Judge would have been disposed to give Canniff youthful offender treatment if he had been eligible. For the Government to fail to bring appellant Canniff to trial during the fourteen months between his arrest and his 26th birthday was "egregious," (United States v. Roberts, supra, slip op. at 2801), particularly since the Government could easily have foreseen that this serious prejudice would be the necessary result of its lengthy delay. (United States v. Roberts, supra, slip op. at 2800). Consequently this Barker factor must also weigh heavily against the Government in this Court's evaluation of Canniff's speedy trial claim.

In this case, as in Roberts:

> the defendant's assertion of his right, the final factor to be considered, is the only one of the four variables elucidated in Barker v. Wingo which militates against the conclusion that Roberts' constitutional right to a speedy trial was violated.
>
> (slip op. at 2803)

In Roberts, trial counsel for the defendant did not raise the speedy trial issue until long after the defendant had passed his 26th birthday and the prejudice which this Court found dispositive had accrued. Id., slip op. at 2803. Here, trial counsel never raised the issue, but the district court took cognizance of it on its own during trial. In Roberts, this Court acknowledged that this "failure to demand an earlier disposition of his case" is not fatal, since the Supreme Court expressly rejected the per se demand-waiver rule (Barker v. Wingo, supra, 407 U.S. at 528). Rather, it is only one of the four factors under Barker, to be assigned an appropriate weight according to the surrounding circumstances. United States v. Roberts, supra, slip op. at 2804.

The circumstances relevant to Canniff's failure to demand a speedy trial, like the factors in Roberts, substantially diminish the seriousness of this failure. In Roberts, this Court, relying on the established principle that the constitutional speedy trial right is a personal right and therefore not waived merely by counsel's inaction, absent a knowing consent by the defendant himself:

> . . . in view of the defendant's almost certain personal ignorance of the implications of delay beyond his 26th birthday, the significance of the demand factor in the Barker v. Wingo balancing test is notably less than usual. This inference flows from the Supreme Court's explanation in Barker v. Wingo, id. 531-32, of the reason why a defendant's assertion of his speedy trial right is a particularly important consideration: because it casts light on the seriousness of the prejudice caused by the delay. "The more serious the deprivation, the more likely a defendant is to complain." Id at 531. Thus, since any nexus between assertion of the right and prejudice suffered is belied in the instant case by Roberts' probable obliviousness to the legal consequences of delay beyond his birthday, the usual justification for assigning great, and perhaps decisive, weight to this single factor is plainly missing. As a result, Roberts' failure to demand an earlier disposition of his case necessarily tends to negative his speedy trial claim only slightly.
>
> (Slip op. at 2804)

This reasoning is even more relevant to the present case than it was to Roberts, since here it is evident that not only the defendant, but also his counsel were ignorant of the prejudice which accrued when the trial was delayed beyond December 26, 1974. Canniff's trial commenced only 13 days after his twenty-sixth birthday (as opposed to eight months in Roberts). It is scarcely logical that any counsel or defendant would knowingly forego eligibility for Youth Corrections Act treatment in the expectation that some greater

counterbalancing benefit would accrue from a 13-day delay in trial. Similarly, trial counsel's unawareness of the speedy trial issue was demonstrated by his failure to move for dismissal of the indictment even when the relevant facts were called to his attention by the district court at trial. If counsel was unaware of these issues, it is scarcely arguable that his client was, or that he knowingly waived them.*

In balancing the four Barker factors in United States v. Roberts, supra, this Court concluded that a Sixth Amendment violation had occurred requiring dismissal of the indictment:

> In terms of the multi-factor balancing test prescribed by the Supreme Court in Barker v. Wingo, assessment of three of the factors in the context of this case strongly indicated that Roberts was denied his Sixth Amendment right to a speedy trial; consideration of the fourth factor, the defendant's assertion of the right, only mildly and inconsequentially qualifies this conclusion.
>
> (Id. slip op. at 2805)

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* Going outside the record, I have learned from defense counsel that he only consented to a waiver of the six month requirement of the district court's "Prompt Disposition Rules." Such a limited waiver clearly did not constitute an agreement by counsel or more importantly his client, to a fifteen month delay, or a delay which would render the client ineligible for Youth Corrections Act treatment. As with the delay agreed to by the defendant in Roberts, this consent did not waive appellant Canniff's right not to be substantially prejudiced by an unconstitutionally long delay in his trial. Id., slip op. at 2803.

The same conclusion is mandated by the facts in this case.

Finally, appellant Canniff submits that since the district court took cognizance of this issue on its own at trial, trial counsel's failure to move for a dismissal of the indictment before trial does not necessitate invocation of the plain error rule (Rule 52(b) Federal Rules of Appellate Procedure) to raise this issue before this Court. If this Court should conclude otherwise, then appellant Canniff submits that the loss of eligibility for Youth Corrections Act treatment, a prejudice foreseeable by the Government as a consequence of its fifteen month delay in the trial below, was plain error affecting substantial rights and therefore cognizable by this Court under Rule 52(b).*

POINT III

THE DISTRICT COURT ERRED IN ALLOWING THE PROSECUTOR TO ASK APPELLANT CANNIFF'S CHARACTER WITNESSES WHETHER THEY WERE AWARE THAT APPELLANT CANNIFF HAD PLEADED GUILTY TO BURGLARY IN 1967.

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* If this Court should conclude that counsel's failure to raise this issue on his own motion below either distinguishes this case from the conclusion of Sixth Amendment violation reached in Roberts, or precludes this Court from recognizing the issue, even as plain error, then appellant Canniff submits that this case should be remanded to the district court for a hearing to consider the circumstances surrounding trial counsel's failure to raise this issue and whether that failure violated appellant Canniff's constitutional right to effective representation of counsel. (See e.g. Saltys v. Adams, 465 F2d 1023 (2d Cir. 1972).

In Point I of this brief, appellant Canniff argued that the prosecutor misconducted himself by referring in summation to the fact of "Bryan Canniff's conviction for burglary in the State of Minnesota," (544) when the Government had introduced no proof of such a conviction. Appellant also submits that it was error requiring reversal for the district court to allow the prosecutor, over the objection of defense counsel, to ask both of Canniff's character witnesses whether they had ever been told "that Bryan Canniff pleaded guilty in 1967 to burglary in the State of Minnesota" (223; see also 218).

The Court is not confronted here with whether a prosecutor may properly ask a character witness whether, to his knowledge, the defendant was ever convicted of any crime. Rather, here, the district court permitted the prosecutor to formulate the question in each instance so as to submit the prosecutor's allegation of conviction of a particular crime in a particular year in a particular state as an established fact. Absent any showing of proof by the Government of such a conviction, the question was without proper foundation (Gross v. United States, 394 F.2d 216,222-3 8th Cir. 1968); Segal v. United States, 246 F.2d 814, 820 (8th Cir. 1957); Roberson v. United States, 237 F.2d 536, 540 (5th Cir. 1956); United States. v. Phillips, 217 F.2d 435, 443

(7th Cir. 1955); cf. Coleman v. United States, 430 F.2d 616 (D.C. Cir. 1969)and so prejudicial as to outweigh any evidentiary value. United States v. Falley, 489 F.2d 33 (2d Cir. 1973).

This error was compounded in this case, since defense counsel claimed that appellant Canniff's only prior involvement with the law was an adjudication as a youthful offender. Absent proof to the contrary, the prosecutor's reference, in questioning the character witnesses, to a prior conviction, was in violation of the commonly recognized principle that youthful offender adjudications are not convictions.

Finally, as suggested in Point I, the district court's error in allowing these questions was further compounded by the prosecutor's reference, in his summation, to the fact of Bryan Canniff's conviction for burglary in the State of Minnesota.

Given the widely recognized prejudice resulting from improper reference to a defendant's prior conviction, the district court's error in admitting this unproven allegation into evidence requires reversal of appellant Canniff's conviction.

POINT IV

THE DISTRICT COURT ERRED IN DENYING APPELLANT CANNIFF'S REQUEST THAT THE GOVERNMENT BE ORDERED TO TURN THE PRESENTENCE REPORT ON ITS PRINCIPAL WITNESS, INFORMANT MILLER, OVER TO THE DISTRICT COURT FOR IN CAMERA INSPECTION SO THAT THE COURT COULD RELEASE THE RELEVANT PORTIONS OF THAT REPORT TO THE DEFENDANTS FOR USE IN IMPEACHING MILLER'S TESTIMONY.

During the trial below, defense counsel requested the district court to order the Government to turn over the presentence report on one of its witnesses, Daniel Miller, so that the Court could inspect the report in camera and release the relevant portions of it to the defense for use in impeaching Miller's testimony. Appellant Canniff submits that the district court erred in denying this request.

Under 18 U.S.C. §3500, the Government is required to turn over the the defense any prior statement of a Government witness unless the district court determines that the portion of the statement which the Government wishes to redact "does not relate to the subject matter of the testimony of the witness." Similarly, Brady v. Maryland, 373 U.S. 83, 87 (1963), requires that the prosecution turn over to the defense any "evidence favorable to an accused . . . where

the evidence is material either to guilt or to punishment . . . " This Court has repeatedly held that evidence which could be used by the defense to impeach a Government witness is either §3500 material or Brady material or both, which must be turned over to the defense. See, e.g., United States v. Seijo, slip opinion 3039,Doc. Nos. 74-2312, 74-2436 (2d Cir. April 23, 1975); United States v. Badalamente, 507 F.2d 12 (2d Cir. 1974); United States v. Pacelli, 491 F.2d 1108, 1109(2d Cir. 1973); United States v. Pfingst, 447 F.2d 177, 194-195 (2d Cir. 1973); United States v. Polisi, 416 F.2d 573, 577-579 (2d Cir. 1969); see also United States v. Mayersohn, 452 F.2d 521 (2d Cir. 1971).

In the present proceeding, the Government relied heavily on Miller's testimony to counter appellant Canniff's defense of entrapment. Moreover, Miller was an informant and admitted drug dealer. By virtue of being precluded from seeing the presentence report, appellate counsel is not in a position to state specifically what of its contents could have been used to impeach Miller's testimony. Clearly, however, that report would have contained admissions by Miller as to his past and present criminal activites.. For the district court to refuse even to inspect that document in camera to determine whether it contained such material was error requiring reversal of appellant Canniff's conviction.

POINT V

APPELLANT CANNIFF ADOPTS ANY ADDITIONAL ARGUMENTS RAISED BY CO-APPELLANT BENIGNO IN SO FAR AS THOSE ARGUMENTS ARE NOT INCONSISTENT WITH THE ISSUES RAISED IN THIS BRIEF.

CONCLUSION

FOR THE ABOVE-STATED REASONS, APPELLANT CANNIFF'S CONVICTION SHOULD BE REVERSED AND THE INDICTMENT DISMISSED OR THE CASE REMANDED FOR A NEW TRIAL.

Respectfully submitted,

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May 19, 1975

Certificate of Service

5/20, 1975

I certify that a copy of this brief and appendix has been served to the United States Attorney for the Southern District of New York, and to counsel for appellant Benigno.